Petition

82-2123

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM MURPHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in the context of a prosecution for Taft-Hartley Act violations, a prosecutor's resort to allegations of corruption and other arguments which exceeded the record and were designed to inflame and prejudice the jury, should require the judgment of conviction be reversed.

LIST OF PARTIES

Petitioner, William Murphy, was the Appellant in the United States Court of Appeals for the Third Circuit and the defendant in the United States District Court for the District of New Jersey.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	i
Opinion Below	1
Jurisdiction	2
Statutes and Rules Involved	2
Statement of the Case	2
Reasons for Granting the Petition	6
Conclusion	8
Appendix A—Statutory Provisions	1a
Appendix B—Third Circuit Order Denying Rehearing	3a
Appendix C—Third Circuit Judgment And Order	4a

TABLE OF AUTHORITIES

Cases *Page*

Berger v. United States, 295 U.S. 78 (1935) 6

New York Central R. Co. v. Johnson, 279 U.S. 40 (1940) 6

United States v. Lanni, 466 F.2d 1102 (3d Cir. 1972) . 7

United States v. Meeker, 558 F.2d 387 (7th Cir. 1977) 6

United States v. Scotto, 641 F.2d 47 (2d Cir. 1980) *cert. denied,* 101 S.Ct. 109 (1981) 7

United States v. Schartner, 426 F.2d 470 (3d Cir. 1970) 7

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 6

United States v. Somers, 496 F.2d 723 (3d Cir.), *cert. denied,* 419 U.S. 832 (1974) 7

United States v. Stahl, 616 F.2d 30 (2d Cir. 1980) 6

STATUTES AND RULES

18 U.S.C. Section 1952 2

28 U.S.C. Section 1254(1) 2

29 U.S.C. Section 186 2

No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM MURPHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

William Murphy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case which affirmed the judgment of conviction entered against him by the United States District Court for the District of New Jersey.

OPINION BELOW

The judgment of conviction was affirmed without opinion by the United States Court of Appeals for the Third Circuit.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1982. William Murphy's petition for rehearing was denied by the Court of Appeals on April 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES AND RULES INVOLVED

The relevant provisions of the Taft-Hartley Act, Title 29, United States Code, Section 186, are set forth in Appendix A, *infra.*

STATEMENT OF THE CASE

The Petitioner, William Murphy, was initially charged in a Nine Court Indictment alleging seven substantive Taft-Hartley violations, and one substantive count of interstate travel in aid of bribery, in violation of Title 18, United States Code, Section 1952 and a conspiracy to commit those offenses. After petitioner, by pre-trial motion, had moved to dismiss the bribery count and the conspiracy count, the Government charged petitioner in a Superseding Information with eight substantive Taft-Hartley misdemeanor violations and one conspiracy to commit those offenses.

After trial, petitioner was convicted of all counts of the Superseding Information and was subsequently sentenced to concurrend one-year terms of incarceration and committed fines of $10,000.00. Petitioner has remained at liberty on bail throughout all stages of these proceedings.

In a wholly circumstantial case, the Government sought to establish that improvement to a home occupied by the petitioner had been paid for by Manuel and Joseph Castelo, who were officers of Castelo & Sons Ship Servic-

ing Corporation. At the time in question, Castelo & Sons Ship Servicing Corporation employed members of the International Longshoremen's Association (ILA), and the petitioner was an officer of ILA.[1] Proof was also offered that the Castelos and William Montella, an employee of Quinn Marine Services, Inc., paid to have a horse barn built on a farm of which petitioner was a part owner.[2]

There was no proof offered to establish that petitioner solicited gifts, pressured employers to provide gifts; performed favors or otherwise acted improperly in exchange for such gifts; or that petitioner in any manner compromised his office with the ILA or the interests of ILA members in exchange for these gratituties.

Despite the fact that the petitioner was tried upon an information alleging receipt of gratituties and excluding all bribery charges, and despite the fact that no proof of corrupt motive or intent was presented in this circumstantial case, the prosecutor continually utilized summation as a vehicle to enflame the jury by portraying petitioner as a corrupt and powerful Union official.

The stage was set in opening summation when the specter of corruption was raised:

> (1) "Now, ladies and gentlemen, this is a picture of 603 Ocean Avenue, and throughout the trial you have heard a lot about it. And after hearing the testimony, I think you can honestly say that 603 Ocean Avenue is the--this is the house that Graft built. Everything--." (Objection sustained).

Having ignited the spark of corruption, the prosecutor fanned the flames of prejudice by arguments which exceeded the proof and which twisted a remark in

1. At the time of trial petitioner had long since retired from holding any office with the ILA.
2. Neither Messrs. Castelo nor Montella were called as a witness at trial.

defense opening into an alleged admission of a concept relationship:

> (2) "We are dealing with an international vice president of the International Longshoremen's Association, a guy who's been in the Union, an official in the Union on the docks for 20 years. When all this stuff is going on around him." (Objection sustained).
>
> * * *
>
> (3) "Now, I would just close by reminding you of something that Mr. Weintraub said in his opening, which isn't evidence, of course. He said to you, 'The evidence will show that there's a lot more to the relationship between the Castelos and William Murphy than the normal cut and dry employer-union official relationship.'
>
> And Mr. Weintraub was absolutely right. The relationship between the Castelos and William Murphy and William Montella as shown by the evidence was not an ordinary relationship. It was a *corrupt* relationship." (Emphasis added) (objection sustained).

Finally, in commenting upon the missing witnesses, Messrs. Castelo and Montella, the prosecutor ignored the continuous sustaining of objections to this line of argument, and invited the jury to speculate about evidence which had not been presented:

> MR. BOOKIN: 'And you heard also with Montella when Assistant United States Attorney Freeh was on the stand that Montella has testified about the subject matter of this proceeding on a prior occasion and that the defendants knew--the defendant has a copy of that testimony.'
>
> 'Now, the defendant is under no obligation to put on any evidence, no obligation to testify, you can't hold that against him. But what you can do is draw conclusions from

the fact that they did not call witness, what the witness' testimony would have been. And, ladies and gentlemen,--

MR. WEINTRAUB: Your Honor--

MR. BOOKIN:--what would the Castelos--

THE COURT: Objection sustained

'Ladies and gentlemen, I'm going to address this aspect in my instruction to you. Again, it's a matter of laws that I will take care of and counsel is directed to refrain from getting into it and I'll sustain this objection. You are instructed to disregard that observation by Mr. Bookin.

MR. BOOKIN: Now, ladies and gentlemen, what would the Castelos had added to the government's case? With all the evidence we have the Castelos would come in and say, "Yes, I wrote all those checks--"

MR. WEINTRAUB: I object.

THE COURT: Objection sustained. Please don't speculate on what might have been said.

MR. BOOKIN: Well, let me say this on whether you draw any conclusions from the failure of either side to call these witnesses. If the Castelos--if the defendant thought that the Castelos were going to say "I never gave this to William Murphy," or "William Murphy didn't know that he was getting--"

MR WEINTRAUB: I object.

THE COURT: I'm going to sustain the objection. Look Mr. Bookin.

MR. BOOKIN: I'm sorry, your Honor.

Well, let me go to a different subject. That is--

THE COURT: Let me deal with it right now since it has been raised now. And I'm going--I'll repeat my instruction at a later point.

'It will be for you to determine the extent to which the witnesses whose names have been given to you were available to be brought in here by subponea or otherwise by both sides. And I will give you more explanation with respect to that when I give you my complete instructions. 'All right. Proceed, please.' "

REASONS FOR GRANTING THE PETITION

The responsibility of fairly and justly presenting the issues for determination in cirminal cases is at times obscured by the complusion to win, the zeal to convict. In order to preserve the proper balance and insure the right to a fair trial, it is necessary that this Court establish a bright line beyond which prosecutors trespass at their peril.

Almost fifty years ago this Court unequivocally articulated the responsibilities borne by prosecuting attorneys in the United States Courts:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States,* 295 U.S. 78, 88 (1935).

Thus, it has been held that a prosecutor's appeal to class prejudice is improper and may require reversal. *United States* v. *Socony-Vacuum Oil Co.,*310 U.S. 150, 239-40 (1940); *New York Central R. Co.* v. *Johnson,* 279 U.S. 310, 319 (1929); *United States* v. *Stahl,* 616 F.2d 30 (2d Cir. 1980). Similarly, arguments or even questions which imply facts beyond the record, or personal knowledge of the prosecutor of a defendant's guilt will require a new trial be granted. *United States* v. *Meeker,* 558

F.2d 387 (7th Cir. 1977); and compare *United States* v. *Somers*, 496 F.2d 723 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974) and *United States* v. *Schartner*, 426 F.2d 470 (3d Cir. 1970).

The improper argument of the prosecutor in the present case incorporated elements from each of these areas. The petitioner is depicted as a long-time and powerful labor leader, a class which arouses deep-seated prejudices as assuredly as references to a defendant's wealth. See *United States* v. *Meeker, supra.*

The references to corruption, corrupt relationships and to the possible incriminatory testimony of uncalled witnesses, were beyond the evidence presented and reflected the prosecutor's own knowledge or belief.[3]

The preservation of fundamental fairness which the Constitution mandates in the trial of a criminal offense, requires that prosecutors and trial courts know with crystal clarity that improper and inflammatory remarks designed to arouse the jury's passions or prejudices, will not be tolerated.

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3. The references to corrupt motive or intent were improper in a case where only Taft-Hartley Act violations were alleged. Such violations are *Malum Prohibitum. United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 109 (1981); *United States v. Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1982

Appendix

APPENDIX A - STATUTORY PROVISIONS

TITLE 29, UNITED STATES CODE, Section 186

Restrictions on financial transactions

Payment or lending, etc. of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of any employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value-

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of

his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

APPENDIX B

THIRD CIRCUIT ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-2124

UNITED STATES OF AMERICA

Plaintiff-Respondent

v.

WILLIAM MURPHY,

Defendant-Petitioner

SUR PETITION FOR REHEARING

HUNTER and HIGGINBOTHAM, *Circuit Judges* and WEINER, *District Judge*

The petition for rehearing filed by William Murphy in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court

S/James Hunter III
Judge

Dated: April 7, 1982

APPENDIX C

THIRD CIRCUIT JUDGMENT AND ORDER

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-2124

UNITED STATES OF AMERICA,

vs.

MURPHY, WILLIAM

Appellant

Appeal From the United States District Court
For the District of New Jersey — Newark
(D.C. Criminal No. 80-00389)

Submitted Under Third Circuit Rule 12(6)
January 13, 1982

Before HUNTER, HIGGINBOTHAM, *Circuit Judges,* and WEINER,*
District Judge

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*Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the court erred in:

1. denying appellant his right to a fair trial by permitting inflammatory and prejudicial remarks of the prosecutor in the course of the opening and rebuttal summation;

2. failing to rule on the requested "Missing Witness" Instruction prior to closing arguments, while conveying the impression that defense counsel had been precluded from arguing that the witnesses' testimony would have been unfavorable to the government,

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

s/James Hunter, III, *Circuit* Judge

Attest,

s/Sally Mrvos, *Clerk*

Date: February 16, 1982